STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND D. TAYLOR,

Plaintiff-Appellant,

v

THE ORIGINAL NICK'S COUNTRY OVEN,

Defendant-Appellee.

UNPUBLISHED
May 9, 2006

No. 266679
Macomb Circuit Court
LC No. 04-004788-NO

Before: White, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in plaintiff's premises liability action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Midday on January 30, 2004, hours after it had snowed, the 65-year-old plaintiff fell while alighting from his truck after parking in a handicapped parking space outside defendant's restaurant. Plaintiff testified that he was talking to his son, who was a passenger in the truck, as he opened the driver's side door to get out of the vehicle. As his left foot hit the pavement, it slid out from under him. Plaintiff extended his left arm to break the fall; this resulted in a torn rotator cuff. Plaintiff, who was employed at the time as a snowplow and salt truck driver, testified that he slipped on "black ice" that he did not see before he slipped. Plaintiff's son testified that he hurried to assist plaintiff and, upon inspection, saw a "big" patch of black ice right outside the driver's side door. The parking lot had been plowed and salted earlier in the morning. Plaintiff's son observed several ice patches at the handicap zone and in the parking lot itself, and there was no snow covering the ice that plaintiff fell on. Plaintiff's son further testified that one couldn't miss the existence of the ice and that if he had been in the driver's seat he would have been able to see the ice when he opened the door. Two employees of defendant testified that they thought plaintiff had been standing on his truck's running board when he fell; defendant's owner testified that there was no ice where plaintiff fell.

The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10), holding that, pursuant to *Kenny v Kaatz Funeral Home Inc*, 472 Mich 929; 697 NW2d 526 (2005), the black ice was an open and obvious condition.

This Court reviews de novo the grant or denial of a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). The trial court may grant summary disposition under MCR 2.116(C)(10) if, considering the substantively admissible evidence in a light most favorable to the nonmoving party, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 238; *Maiden v Rozwood*, 461 Mich 109, 119-121; 597 NW2d 817 (1999); see also MCR 2.116(G)(6).

A landowner has a duty to exercise reasonable care to protect an invitee from unreasonable risks of harm caused by dangerous conditions on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, landowners are not required to protect invitees from "open and obvious dangers" unless "special aspects" exist that render an open and obvious danger unreasonably dangerous. *Id.* at 516-517.

A danger is open and obvious if "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). This test is objective; the question, therefore, is "'whether a reasonable person in [the plaintiff's] position would foresee the danger.'" *Corey, supra* at 5, quoting *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997).

The danger presented by the accumulation of ice and snow has generally been held to be open and obvious. See *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002); *Corey, supra*. Thus, a plaintiff must normally present evidence of special circumstances to differentiate his case from the typical situation involving ice, snow, or frost. *Perkoviq, supra* at 19-20; *Corey, supra* at 4-5, 8.

Plaintiff relies on *Kantner v Ann Arbor Tower Plaza Condominiums Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued November 16, 2004 (Docket No. 250202), in contending that whether the black ice was open and obvious presents a question of fact for the jury. In *Kantner*, the plaintiff slipped and fell on ice that she did not see until after she fell. This Court, noting that "[b]y its very nature, black ice is not noticeable *even without* a covering of snow," held that the trial court had improperly determined that the ice was open and obvious as a matter of law. *Id.*, slip op at 5-6 (emphasis supplied).[1] However, in so holding, the *Kantner* majority relied on this Court's opinion in *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99; 689 NW2d 737 (2004), which was subsequently reversed by our Supreme Court.[2]

In *Kenny*, the elderly plaintiff slipped and fell on snow-covered black ice. A majority of this Court reversed the trial court's grant of summary disposition in favor of the defendant,

[1] Judge Hoekstra dissented, opining that "[a]ny reasonably prudent person living and working in Michigan during the winter months understands that rain and sleet during the daylight hours can result in the formation of black ice." *Id.*, slip op p 1 (Hoekstra, J., dissenting).

[2] We also note that, being an unpublished opinion, this Court's decision in *Kantner* is not binding authority. MCR 7.215(C)(1).

holding that "reasonable minds could differ regarding the open and obvious nature of black ice under snow; therefore, the openness and obviousness of the danger must be determined by a jury." The Supreme Court summarily reversed for the reasons cited by the dissenting judge, who opined that the plaintiff, a lifelong resident of Michigan, should have been aware of the possibility of ice. 472 Mich 929 (2005).

Similarly, in *Schultz v Henry Ford Health Systems*, 474 Mich 948; 706 NW2d 203 (2005), the Supreme Court reversed this Court's decision holding that a question of fact existed for the jury concerning whether black ice, which was hidden below one to two inches of snow, constituted an open and obvious danger. The Court, citing its order in *Kenny*, *supra*, reinstated the trial court's grant of summary disposition in favor of defendant.

The Supreme Court's orders in *Kenny*, *supra*, and *Schultz*, *supra*, require affirmance of the trial court's decision in this case. Plaintiff's son testified that ice was visible in the parking lot and that, had he been looking at the ground, a person in plaintiff's position would have seen the ice on the pavement outside plaintiff's door. Plaintiff, who essentially concedes that he was not looking where he was going when he exited his truck, has presented no evidence to establish an issue of fact concerning the open and obvious nature of the ice. Plaintiff's fall took place in the middle of winter, hours after it had snowed. Snow was visible in the parking lot, and it was obvious that it had recently been plowed. Plaintiff, by his very occupation as a snowplow operator, was obviously familiar with Michigan weather and snowy conditions. Under these circumstances, a person of ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection.[3] *Corey*, *supra* at 5.

Affirmed.

/s/ Helene N. White
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

[3] Plaintiff does not contend that "special aspects" existed that rendered the icy condition unreasonably dangerous. Therefore, we will not address that question.